

PROBLEMS OF REFUGEE PROTECTION IN INTERNATIONAL LAW: AN ASSESSMENT THROUGH THE ROHINGYA REFUGEE CRISIS IN INDIA

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The present article deals with the problems of refugees under international law. The purpose is two-fold – to understand the legal framework for the protection of refugees and to understand the manner in which the international legal framework is adopted by States in their domestic jurisdictions. The limitation of international law in addressing the refugee problem is highlighted through ‘contestations’ and ‘fault-lines’. It is argued that such contestations and fault-lines exist in the manner in which conceptions like sovereignty, nationality, territoriality, jurisdiction, and legal obligation are clothed and implemented in the international legal discourse. The example of Rohingya refugee crisis from India is employed to contextualise the discussion. Some notable developments towards the construction of a more robust regime for refugee protection under international law have also been highlighted in the last section.

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I. INTRODUCTION

The article shall aim to identify some of the problems from the perspective of legal protection to refugees under international law, contextualising the problems or crises of Rohingya refugees in India. It does not discuss specific problems of the Rohingya refugees, nor does it list any such problems. It traverses along a general discourse, which is usually employed while discussing the refugee problems in both domestic and international law. This discourse is normally concerned about the ‘identity’ of the refugees. Therefore, the intention is not to hold an enquiry into the causes and conditions of Rohingya refugees or to provide a solution to the crisis, either under domestic legal framework or under international law. Instead, the purpose is to understand the efficacies of both the domestic and international legal frameworks in responding to refugee crises in general. A legal investigation into the Rohingya crisis in India has been undertaken to merely contextualise the discussion, both from national and international perspectives. Again, the purpose is not to dwell on the magnitude of the crisis, but to assess the legal responses to it. Needless to say, Rohingya crisis provides one of the most pronounced pictures of the inefficiencies of our legal systems, both national and international, in dealing with the refugee crises.

International refugee law, international human rights law and international law in many ways seem to reinforce each other, as they need to be interpreted within the framework of general international law. It is important to understand the interconnectedness and harmonious relationship between these fields of law. In essence, one can envisage an overlapping of regimes and even a possible linkage between these regimes. For instance, Vera Gowlland-Debbas suggests that linking refugee law with human rights law have certain benefits like bringing specificity in refugee obligations and better grounding in positive international law. However, there are certain pitfalls as well. Some of the pitfalls she identifies include, “the domestic versus international jurisdiction debate, the pitting of traditional concepts of state sovereignty against the imperatives of humanitarian intervention, the tensions between political/security and humanitarian

concerns, issues of State responsibility in areas where reciprocity does not play its traditional role, and the problem of institutional coordination and overlapping mandates”¹

Identifying the necessary overlap between international refugee law and human rights law, she observes that the international legal regime would be insufficient to address the refugee problems around the world without supplementing it using domestic legal regimes;² and, *inter alia* suggests international consensus around the notion of humanitarian access.³ It is through such responsibility that solutions to refugee problems can be found, because inherent in that concept is the notion of restoration of national protection.

It is also necessary that the notion of sovereignty⁴ should result in a unified understanding for inter-state cooperation because the transition of international law has been from confrontation to cooperation, as evidenced in the U.N. Charter and reaffirmed in the debates of the U.N. Friendly Relations Declaration.⁵ Such cooperation is imperative for the realisation of human rights of individuals at all times, i.e., during peace and conflict. It is crucial to examine the functional interdependence between ‘protection of individuals,’ their ‘human rights,’ and ‘international responsibility’.⁶ This interdependence, if viewed from the perspective of international cooperation and shared responsibility, by understanding the causes of humanitarian catastrophes, can enable us to shape our responses accordingly. Further, with the concerns of globalization, the principles of international cooperation and shared responsibility have become prominent.⁷ It is common knowledge that protection of refugees is intertwined with issues that include “State interests, public opinion, human rights violations, the implementation of international obligations at the national level, and Statelessness.”⁸

¹ Vera Gowlland-Debbas (ed.), *The Problem of Refugees in The Light of Contemporary International Law Issues*, Papers presented at the Colloquium organized by the Graduate Institute of International Studies in collaboration with the Office of the United Nations High Commissioner for Refugees, Geneva, 26 and 27 May, 1994 Martinus Nijhoff Publishers, The Hague/Boston/London.

² *Id.*

³ Vera Gowlland-Debbas, *supra* note 1.

⁴ See generally, Dabiru Sridhar Patnaik, *Issues of State Consent and International Humanitarian Assistance in disasters: The Work of the International Law Commission*, in HUMANITARIAN ACTION: GLOBAL, REGIONAL AND DOMESTIC LEGAL RESPONSES 107 (Andrej Zwitter, Christopher K. Lamont, Hans-Joachim Heintze & Joost Herman eds., 2014), for a discussion on humanitarian imperatives and sovereignty.

⁵ Dabiru Sridhar Patnaik, *Towards an International Legal Framework for the Protection of Individuals in the Event of Disasters: An Initial Inquiry*, in INTERNATIONAL LAW AND HUMANITARIAN ASSISTANCE: A CROSSCUT THROUGH LEGAL ISSUES PERTAINING TO HUMANITARIANISM 129, 139 (Hans-Joachim Heintze & Andrej Zwitter eds., 2011).

⁶ *Id.*

⁷ MARGOT E. SALOMON, GLOBAL RESPONSIBILITY FOR HUMAN RIGHTS: WORLD POVERTY AND THE DEVELOPMENT OF INTERNATIONAL LAW 71 (2007).

⁸ Guy S. Goodwin Gill, *The Dynamic of International Refugee Law*, 25 INT’L J. REFUGEE LAW 651, 651 (2013).

In this backdrop, considering the case study of Rohingya refugees, the paper highlights the domestic legal framework for refugees in India, especially focusing on the fact that there is no law on refugee protection in India. Moreover, India is a member neither of the Refugee Convention, 1951 nor of its Additional Protocol of 1967. Therefore, the response of India to refugees is dependent mostly upon the policies of the Government. The paper also discusses the stand that Indian Government has recently taken with respect to the Rohingya refugees. The second part of the paper deals with the problems of refugee protection in India. For instance, there does not exist any valid definition of 'refugees' under the domestic law of India. Further, in most of the instances, the legal status of asylum seekers is defined under the Foreigners Act, 1946. In such a situation, it is the policy of the Government that renders legal protection to such individuals. While discussing the legal and policy standards in India, however, the paper does not attempt to delineate any solutions either for policy-making or for law-making at the domestic level. In the third part, the paper discusses the nature of non-refoulement obligations under international law, highlighting the source of these obligations in treaty-law and customary law, and particularly as a *jus cogens* norm. The purpose of the discussion is to highlight the problems in implementation of these obligations, irrespective of their source. Issues in national security which States normally take as an exception while deciding upon the status of refugees in their territories are also discussed from the perspective of international law. The discussion ends with an analysis of the national security exception in the Indian scenario, bringing into context the Rohingya situation. The fourth part of the paper highlights some inherent problems in international law in dealing with the refugee issues. These problems are identified both in the form of 'Contestations' and 'Fault-Lines'. After defining the respective terms, the paper proceeds with discussing issues of State sovereignty, nationality, territory, jurisdiction, and legal obligations. The contestations are discussed in the understanding of these concepts, while the fault-lines are discussed in the application of the concepts. Some prefatory remarks are offered in the final part of the paper. It is argued that some progress in international protection of individuals could only be done keeping in mind the changing dynamics of the relationship between international law and domestic law, while also creating better understanding around the identified contestations and fault-lines.

II. THE CHALLENGES: REFUGEES IN INDIA

A. Law and Policy on Refugees in India

India is not a party to the Refugee Convention, 1951 ('the Convention') and its Additional Protocol, 1967. India also does not have any ascertainable legal regime governing the status of refugees. There is neither any domestic law, nor the Government of India ('GoI') has framed any policy to govern the status of refugees on its territory. Scholars like B.S. Chimni have identified certain grounds

on which India allegedly seems to not agree with the current refugee regime under international law.⁹ First, the Convention and its Protocol have a strong Eurocentric bias, which does not appreciate the concerns of the Asian world, especially the Indian conditions. Despite India being an original member of the United Nations, it did not sign the Convention since it could not find proper recognition for millions of people who migrated during its partition from Pakistan, under the Convention. Second, the definition of refugee as based in individual identity and concern could not fit well within Indian conception of identifying group or community movement across borders. Third, the Convention did not provide any space to deal with the problems of mixed migration, comprised of both voluntary and forced migrations. Even though India wanted both group movement and mixed migration to be a subject matter of the law, unfortunately this could not be achieved. Fourth, the Convention did not provide for any burden sharing mechanism. In this respect, a clear-cut divide between Global North and Global South seems to be visible. While the laws were constructed by the North, the majority of refugee population was hosted by the South.¹⁰

There is no official definition of refugee as applicable in India, though there are a number of legislations that regulate the conditions of migrants. For instance, Passport Act, 1967; the Foreigners Act, 1946; and, the Foreigners Order, 1948.¹¹ In the absence of a national law on refugees, it is often asserted that the question of granting refugee status does not arise.¹² The approach of the GoI also does not seem uniform in this regard. It grants Long Term Visa ('LTV') in some instances to the immigrants,¹³ which entitles them to "take up any employment in the private sector or to undertake studies in any academic institution."¹⁴ On the other hand, it also identifies some immigrants as illegal - "(i) Foreign nationals who have entered into India on valid travel documents and found to be overstaying or (ii) Foreign nationals who have entered into the country without any valid travel document."¹⁵ These illegal immigrants are not entitled to extended stay in India and, thus, are not granted the LTV. While in the past, Bills formulating national framework on refugee policy have been under consideration, nothing concrete has

⁹ B.S. Chimni, *Status of Refugees in India: Strategic Ambiguity*, in *REFUGEES AND THE STATE: PRACTICES OF ASYLUM AND CARE IN INDIA, 1947-2000*, 444 (Ranabir Samaddar ed., 2003).

¹⁰ *Id.*; See also Bhairav Acharya, *The Future of Asylum in India: Four Principles to Appraise Recent Legislative Proposals*, 9 *NUJS L. Rev.* 173 (2016).

¹¹ According to Rule 5 of the aforesaid Order, the foreigner may be detained when permission to enter is refused.

¹² Lok Sabha, Un-starred Question No. 334, Answered on 19.07.2016.

¹³ As per the S.O.P as effective from December 29, 2011, "cases, which are prima facie justified on the grounds of a well-founded fear of persecution on account of race, religion, sex, nationality, ethnic identity, membership of a particular social group or political opinion, can be recommended by the State Government/Union Territory Administration to the Ministry of Home Affairs for grant of Long term Visa (LTV) after due security verification."; See Lok Sabha, Un-starred Question No. 739, Answered on 15.07.2014.

¹⁴ Lok Sabha, Un-starred Question No. 894, Answered on 1.03.2016; Rajya Sabha, Un-starred Question No. 507, Answered on 13.08.2014.

¹⁵ Lok Sabha, Un-starred Question No. 3993, Answered on 10.08.2016.

happened so far. This includes the Refugee and Asylum Seekers (Protection) Bill of 2006 and other Asylum Bills of 2015 introduced in the 16th Session of the Lok Sabha (Lower House of the Parliament of India).¹⁶

Further, there is an absence of a national policy on refugees in India. GoI has traditionally issued guidelines for the respective situations - Tibetan Rehabilitation Policy,¹⁷ Amendments under Passport (Entry into India) Act, 1920, and Foreigners Act, 1946.¹⁸ However, in some situations, for instance with Sri Lankan and Afghan refugees, it has further followed a rehabilitation and voluntary repatriation policy.¹⁹ The Statement of Policy (SOP) as effective from December 29, 2011 mentions that “the entry, stay, and movement etc. of refugees are regulated in accordance with the provisions contained in Foreigners Act, 1946, and Rules and Orders framed thereunder, Registration of Foreigners Rules, 1939 and Foreigners Order, 1948...”²⁰

The response of the Indian judiciary on the protection of refugees seems to have adopted some change though. The Supreme Court of India in *Hans Muller v. Supt., Presidency Jail*²¹ recognized the ‘absolute and unfettered’ power of the Government to expel the foreigners.²² The position was reiterated in *Louis De Raedt v. Union of India*.²³ On the contrary, however, in *Dr. Malavika Karlekar v. Union of India*,²⁴ the Supreme Court stopped the deportation of twenty-one Burmese refugees from the Andaman Islands whose applications for refugee status were pending, and gave them the right to have their refugee status determined.²⁵ In another case, wherein it was sought to send the person back to Sri

¹⁶ *The Protection of Refugees and Asylum Seekers’ Bill, 2015* (Bill No. 290 of 2015) introduced by Mr. Ravindra Kumar Jena on November 13, 2015 <http://164.100.47.4/billstexts/lbills/AsIntroduced/3024LS.pdf>; *The Asylum Bill, 2015* (Bill No. 334 of 2015) introduced by Dr. Shashi Tharoor on November 13, 2015 <http://164.100.47.4/billstexts/lbills/AsIntroduced/3088LS.pdf>; *The National Asylum Bill, 2015* (Bill No. 342 of 2015) introduced by Mr. Feroze Varun Gandhi on November 18, 2015 <http://164.100.47.4/billstexts/lbills/AsIntroduced/3028LS.pdf> (all the links last visited February 28, 2018).

¹⁷ Lok Sabha, Un-starred Question No. 3574, Answered on 08.08.2017; Rajya Sabha, Starred Question No. 69, Answered on 29.04.2015.

¹⁸ Lok Sabha, Un-starred Question No. 894, Answered on 1.03.2016 (“The reasons behind such steps is to regularize the entry and stay of persons belonging to minority communities in Bangladesh and Pakistan, namely Hindus, Sikhs, Buddhists, Jains, Parsis and Christians who were compelled to seek shelter in India due to religious persecution or fear of religious persecution, and who entered India on or before the 31st December 2014.”).

¹⁹ Lok Sabha, Un-starred Question No. 5433, Answered on 29.08.2001.

²⁰ Lok Sabha, Un-starred Question No. 3874, Answered on 24.08.2004.

²¹ *Hans Muller v. Supt., Presidency Jail*, AIR 1955 SC 367.

²² Security legislations like the National Security Act, 1980 give absolute power to the Government to detain a foreigner. See, Arun Sagar & Farrah Ahmed, *The Model Law for Refugees: An Important Step Forward*, 17 STUDENT B. REV. 73, 75 (2005).

²³ *Louis De Raedt v. Union of India*, (1991) 3 SCC 554.

²⁴ *Malavika Karlekar v. Union of India*, CrI. WP No. 243 of 1988, decided on 25-9-1992 (SC) (UR).

²⁵ See also *Bogyi v. Union of India*, Civil Rule No. 1847 of 1989, decided on 17-11-1989 (Gau); *Ktaer Abbas Habub Al Qutaifi v. Union of India*, 1998 SCC OnLine Guj 304 : 1999 Cri LJ 919; Sagar & Ahmed, *supra* note 22, at 76.

Lanka, the District Court of Dwarka stepped in to emphasise upon the relevance of non-refoulement principle.²⁶ The case was celebrated in the media.²⁷ The Metropolitan Magistrate, in the case, emphasised that protection of the lives of refugees is based in human rights jurisprudence embedded in Article 21 of the Constitution of India. In a more recent verdict of the Supreme Court, *Dongh Lian Kham v. Union of India*,²⁸ it was observed that the principle of non-refoulement is a part of Article 21 of the Indian Constitution as the principle is closely related to life and personal liberty of the person. Therefore, the protection under the Article must be available to the refugees. However, such freedom should not be granted at the cost of national security. This was in contradiction to the earlier stand of the Court in *Mohd. Sediq v. Union of India*,²⁹ where it had allowed the foreigner to be deported from India, emphasising that the decision and guidelines of the Central Government were paramount. Therefore, it seems that the law and policy framework governing refugees in India is quite unclear and ambiguous. The progress in the judicial response though appreciative, has also been quite slow.

B. The Rohingya Situation

Issues around national security amid the presence of migrants on domestic soil are not new.³⁰ Starting early 2000s, trends around these lines started to come up across many countries in the world.³¹ In India, questions were posed regarding the alleged involvement of Afghan refugees in terrorist activities,³² and security

²⁶ The principle of non-refoulement in international law generally refers to the obligation upon a State to not repatriate an individual seeking asylum in its territory, to the territory in which the individual might be subjected to persecution. There are various sources of this obligation under international law. This is discussed in the subsequent sections of the paper.

²⁷ *State v. Chandra Kumar and Others*, First Information Report No. 78/10, Court of Metropolitan Magistrate (Dwarka), New Delhi, (September 20, 2011). For media reporting on the case see, J. Venkatesan, *Magistrate: how can court become party to persecution of refugee?*, THE HINDU (September 21, 2001), <http://www.thehindu.com/news/national/magistrate-how-can-court-become-party-to-persecution-of-refugee/article2471121.ece>. Also see, PC Vinoj Kumar, *A Delhi court delivers landmark verdict sympathising with the Sri Lankan Tamils*, 2(38) THE WEEKEND LEADER (Sep. 6, 2011) <http://www.theweekendleader.com/Causes/706/fine-verdict.html>.

²⁸ *Dongh Lian Kham v. Union of India*, 2015 SCC OnLine Del 14338 : (2016) 226 DLT 208.

²⁹ *Mohd. Sediq v. Union of India*, 1998 SCC OnLine Del 572 : (1998) 47 DRJ 74.

³⁰ Yogesh K. Tyagi, *National Security in a New International System*, in GLOBAL ORDER: RECENT CHALLENGES AND RESPONSES 257 (Alokesh Barua ed., 1992). (In traditional terms, national security means the protection of territorial integrity and political independence of a State. If a State's territory is secured, it has national security. Otherwise, it does not. It was essentially a State-centric conception of national security and, even in that sense, it was built upon a narrow definition of the term 'State', giving almost exclusive attention to the most visible ingredient of a State, that is territory, without taking cognizance of the fact that an entity, in order to be called "'State', must also possess certain other equally important ingredients and the most important among them is the "'people' living within the territory of that State.)

³¹ For instance, policies that favour national security above refugee protection were adopted in both the U.S. and Europe. Joanne Van Selm, *Refugee Protection in Europe and the US after 9/11*, in PROBLEMS OF PROTECTION: THE UNHCR, REFUGEES AND HUMAN RIGHTS 237, 251-259 (Niklaus Steiner, Mark Gibney, and Gil Loescher eds., 2003).

³² Lok Sabha, Un-starred Question No. 441, Answered on 20.11.2001.

concerns were raised due to refugees arriving from Sri Lanka during the conflict.³³ The response of GoI in such cases has been to acknowledge the risk of security breaches and to prescribe security measures to prevent the re-occurrence of such instances. As per the statements issued by the Government from time to time, India does not have organized instances of repatriation;³⁴ instead, it follows a policy of voluntary repatriation and rehabilitates the refugee with the broader aim of repatriation at a future date.³⁵ With respect to deportation of illegal migrants, it seems that the Government has long been considering “establishment of Immigration Tribunals, establishment of Special Courts, creation of a separate Immigration Cadre, enhancement of penalty of imprisonment for the violation of the provisions of the Foreigners Act from the existing maximum of five years to eight years, etc.”³⁶

The influx of Rohingya population in India started in 2012-2013 and there are more than 40,000 Rohingya Muslims residing in India.³⁷ Earlier in 2014, the debates in Lok Sabha around the situation of Rohingyas brought mixed responses. Where some members highlighted the sad plight of the refugees, there were others who raised security concerns arising out of the influx of refugees from the conflict affected areas.³⁸ Quite recently, the GoI has taken the stand that the Rohingya population in India is a potential threat to its national security and therefore, needs to be deported.³⁹ This was challenged in the Supreme Court of India on the ground of violation of both Article 21 of the Indian Constitution⁴⁰ and *jus cogens*⁴¹ obligation under international law.⁴² However, the Government has made it clear that this is a policy decision in which the Executive has an upper hand and the Court need not decide it.⁴³ The stand of the Government

³³ Lok Sabha, Un-starred Question No. 4256, Answered on 21.08.2001

³⁴ Lok Sabha, Un-starred Question No. 3535, Answered on 19.08.2003; Lok Sabha, Un-starred Question No. 4747, Answered on 23.04.2002.

³⁵ Lok Sabha, Un-starred Question No. 3397, Answered on 20.03.2001.

³⁶ Lok Sabha, Un-starred Question No. 387, Answered on 18.12.2001.

³⁷ Affidavit Submitted by the Government of India in *Mohd. Salimullah v. Union of India*, Writ Petition (Civil) No. 793 of 2017 (SC) (Pending), at para 26 https://barandbench.com/wp-content/uploads/2017/09/170917_Final_Salimullah_affidavit_to_be_filed-watermark.pdf (last visited February 28, 2018).

³⁸ Statement by Dr. A. Sampath, Lok Sabha Debates, 16TH Lok Sabha Session, 2014

³⁹ *Supra* note 37.

⁴⁰ *Dongh Lian Kham v. Union of India*, 2015 SCC OnLine Del 14338 : (2016) 226 DLT 208.

⁴¹ *Jus cogens* obligations are considered as most basic obligations under international law from which, the parties are not allowed to derogate in any manner, either directly or indirectly.

⁴² *Deporting Rohingya could have huge implications on India and tarnish global image, says lawyer Colin Gonsalves*, FIRST POST, (Sept. 27, 2017), <http://www.firstpost.com/yindia/deporting-rohingyas-would-have-huge-implications-on-india-says-lawyer-colin-gonsalves-4085149.html>.

⁴³ In the affidavit submitted, the Centre told the Supreme Court that the decision whether or not to allow refugees to settle in the country was best left to the Executive. See, *Are Rohingya Muslims a Threat to Our National Security? Arguments For and Against*, MIRROR NOW, (Sept. 18, 2017), <http://www.timesnownews.com/mirrornow/news/in-focus/are-rohingya-muslims-a-threat-to-our-national-security-arguments-for-and-against/52379>.

has been criticized from various quarters, including the U.N. Human Rights Commission.⁴⁴

III. THE CHALLENGES OF REFUGEE PROTECTION: A DOCTRINAL INVESTIGATION

A. The Obligation of Non-refoulement

Article 31(1) of the 1951 Convention Relating to the Status of Refugees states: “No Contracting State shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion,”⁴⁵

It seems that non-refoulement has been a guiding principle of refugee law since its appearance in the 1933 Convention relating to the International Status of Refugees.⁴⁶ However, the principle has now been accepted in its various forms across various laws. Therefore, it has become even more difficult to ascertain its working. Non-refoulement obligation has become an important ingredient of human rights treaties, for instance, Article 3 of the Convention against Torture (‘CAT’),⁴⁷ Article 7 of the International Covenant on Civil and Political Rights (‘ICCPR’),⁴⁸ and Article 3 of the European Convention on Human Rights (‘ECHR’),⁴⁹ deal with non-refoulement. Their treatment of non-refoulement is based upon the conditions that the repatriated person might be exposed to after his or her return in the same country or another. Moreover, by virtue of it being

⁴⁴ *Branding Rohingya As Terrorists Unfair, Discriminatory: Supreme Court Told*, UMMID.COM & AGENCIES (Sept. 13, 2017) <http://www.ummid.com/news/2017/September/13.09.2017/rohingya-muslim-petition-in-supreme-court.html>. (United Nations High Commissioner for Human Rights, Zeid Ra’ad Al Hussein observed recently, “By virtue of customary law, its ratification of the International Covenant on Civil and Political Rights, the obligations of due process, and the universal principle of non-refoulement, India cannot carry out collective expulsions, or return people to a place where they risk torture or other serious violations.”)

⁴⁵ Convention Relating to the Status of Refugees art. 33(1), July 28, 1951 189 U.N.T.S. 137.

⁴⁶ Convention relating to the International Status of Refugees art. 3, Oct. 28, 1933 159 L.N.T.S. 3663. See, Aoife Duffy, *Expulsion to Face Torture? Non-refoulement in International Law*, 20(3) INT’L J. OF REFUGEE L. 373 (2008).

⁴⁷ Convention Against Torture and Cruel, Inhuman or Degrading Treatment or Punishment art. 3, Dec. 10, 1984, 189 U.N.T.S. 150. (“No State Party shall expel, return (‘refouler’) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”)

⁴⁸ International Covenant on Civil and Political Rights art. 7, Mar. 23, 1976, 999 U.N.T.S. 171. (“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.”)

⁴⁹ Convention for the Protection of Human Rights and Fundamental Freedoms, 1950 art. 3, Sept. 3, 1953, 213 U.N.T.S. 222. (“No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”)

adopted in general multilateral treaties and also being practiced individually by the States, it has been recognised as a part of customary international law.⁵⁰

CAT, ICCPR and ECHR provide for non-refoulement in the most succinct manner by emphasising upon the non-derogability of the prohibition of torture and/or ill treatment. However, the language of non-refoulement in the Refugee Convention is quite different. Where Article 42 (1) of the Convention provides for non-derogability of the principle, there is an inherent exception embedded in Article 33(2) of the Convention, which provides,

The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of particularly serious crime, constitutes a danger to the community of that country.⁵¹

James Hathaway and Colin Harvey identify two main tests that are applicable in assessing whether the asylum seeker or the refugee is a danger to the national security of the asylum State.⁵² The first test requires the asylum State to show that the person is a danger to the security of the State based on reasonable grounds. Second, if the person has been convicted of a serious crime, he constitutes a danger to the community of the asylum State.⁵³ Moreover, Article 3 of the 1967 United Nations Declaration on Territorial Asylum significantly prohibits refoulement with exceptions. It provides that exceptions may be made to the non-refoulement principle only for overriding reasons of national security, or in order to safeguard the population as in the case of a mass influx of persons. This exception of national security seems to also have been accepted by the Canadian Supreme Court in *Suresh* case,⁵⁴ wherein the Court accepted that refoulement could occur in exceptional circumstances if a substantial risk to the national security of the State was proven.⁵⁵ Similarly, the 1997 U.N. General Assembly Resolution on Measures to Eliminate International Terrorism states that the acts

⁵⁰ Elihu Lauterpacht and Daniel Bethlehem, *The Scope and Content of the Principle of Non-refoulement: Opinion*, in REFUGEE PROTECTION IN INTERNATIONAL LAW: UNHCR'S GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION (Erika Feller, Volker Türk & Frances Nicholson ed., 2003); INT'L HELSINKI FEDERATION, *Extraditions, Expulsions, Deportations, in ANTI-TERRORISM MEASURES, SECURITY AND HUMAN RIGHTS – DEVELOPMENTS IN EUROPE, CENTRAL ASIA AND NORTH AMERICA IN THE AFTERMATH OF SEPTEMBER 11* (2003).

⁵¹ Convention Relating to the Status of Refugees art. 33(2), July 28, 1951 189 U.N.T.S. 137.

⁵² J.C. Hathaway & C.J. Harvey, *Framing Refugee Protection in the New World Disorder* 34 CORNELL J. INT'L L. 290 (2001). See also, See, Duffy, *supra* note 46, at 375.

⁵³ Hathaway and Harvey also seem to allude to the exception of national security. See, Hathaway & Harvey, *supra* note 52. See, Duffy, *supra* note 46, at 375.

⁵⁴ *Manickavasagam Suresh v. Canada* (Minister of Citizenship and Immigration), 2002 SCC OnLine Can SC 2 : 2002 SCC 1.

⁵⁵ See Aoife Duffy, *supra* note 46, at 383.

of terrorism are contrary to the principles and standards of the United Nations.⁵⁶ Interestingly, by using the language of Article 1(F) exception,⁵⁷ the General Assembly also attempted to redefine those deemed unworthy of refugee status.⁵⁸ However, this seems untenable in a situation where elements of national security are fluid and discussions around terrorism are volatile.⁵⁹

As part of its regional law, the Parliamentary Assembly of the Council of Europe, in 1965, affirmed that Article 3, ‘by prohibiting inhuman treatment, binds contracting parties not to return refugees to a country where their life or freedom would be threatened.’⁶⁰ The European Court of Human Rights (‘ECtHR’) in *Republic of Ireland v. United Kingdom*⁶¹ emphasized upon the unconditional character of Article 3 by observing, “the Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment, irrespective of the victim’s conduct.”⁶² The Court further elaborated, “Article 3 makes no provision for exception...there can be no derogation therefrom even in the event of a public emergency threatening the life of the nation.”⁶³ In *Soering v. United Kingdom*,⁶⁴ the ECtHR held that transferring *Soering* to a territory where he risked experiencing cruel and inhuman treatment, clearly in violation of Article 3 would be ‘contrary to the spirit and intendment’ of the Article.⁶⁵ Similarly, in *Chahal v. United Kingdom*, the ECtHR ruled that the non-derogability of Article 3 was absolute, even in times of national emergency.⁶⁶

The element of non-derogability under the human rights treaties further takes us to examine the standards of non-refoulement as established under customary law. Lauterpacht and Bethlehem define non-refoulement as a concept, “which prohibits States from returning a refugee or asylum-seeker to territories where there is a risk that his or her life or freedom would be threatened on account

⁵⁶ G.A. Res. 52/165, Measures to Eliminate International Terrorism, (Dec. 15, 1997).

⁵⁷ Article 1 F states that the Refugee Convention would not be applicable in situations where the person has committed international crime or serious non-political crime or has violated the purposes and principles of the United Nations.

⁵⁸ Duffy, *supra* note 46, at 384.

⁵⁹ G.A. Res. 37/195, (Dec. 18, 1982). (Report of the United Nations High Commissioner for Refugees submitted on 18th December 1982, affirmed the “need for Governments to cooperate fully with to facilitate the effective exercise of this essential function, in particular by acceding to and fully implementing the relevant international and regional instruments and scrupulously observing the principles of asylum and non-refoulement.”).

⁶⁰ EUR. PARL. ASS. DEB., *Recommendation 434 concerning the granting of the Right of Asylum to European Refugees (Oct. 1, 1965)*. (See Doc. 1986, report of the Committee on Population and Refugees as cited in Duffy, *supra* note 46, at 378 n. 27.

⁶¹ *Republic of Ireland v. United Kingdom*, (1978) 2 EHRR 25.

⁶² *Republic of Ireland v. United Kingdom*, (1978) 2 EHRR 25 at 163.

⁶³ *Id.*

⁶⁴ *Soering v. United Kingdom*, (1989) 11 EHRR 439.

⁶⁵ *Id.*

⁶⁶ *Chahal v. United Kingdom*, (1996) 23 EHRR 413.

of race, religion, nationality, membership of a particular social group or political opinion.⁷⁶⁷

Once it is established that non-refoulement is a part of custom, it becomes quite difficult to carve an exception against it. It is interesting to note that more than 90% of States are parties to the CAT or the ICCPR, where refoulement is prohibited in one form or the other. This clearly establishes the normative status of non-refoulement in international law.⁶⁸ As far as the diversity in practices and creation of exceptions by the States is concerned, one may recall the observations of the International Court of Justice in *Nicaragua case*,⁶⁹ wherein it observed:

In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule. If a State acts in a way prima facie incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule.⁷⁰

The principle of non-refoulement being a part of the customary international law, also means that all States, whether or not they are a party to the human rights and/or refugee conventions incorporating the prohibition against refoulement, are obliged to not return or extradite any person to a country where the life or safety of that person would be seriously endangered.⁷¹ Along these lines, the States not party to the Refugee Convention and the 1967 Protocol have, interestingly, “confirmed to the United Nations High Commissioner for Refugees (‘UNHCR’) that they recognize and accept the principle of non-refoulement”⁷²

⁶⁷ Lauterpacht & Bethlehem, *supra* note 50.

⁶⁸ Duffy, *supra* note 46, at 377.

⁶⁹ Military and Paramilitary Activities in and Against Nicaragua (*Nicaragua v. United States*), Judgment, 1986, I.C.J. Rep. 14, 98.

⁷⁰ *Id.*

⁷¹ INT'L HELSINKI FEDERATION, *Extraditions, Expulsions, Deportations, in ANTI-TERRORISM MEASURES, SECURITY AND HUMAN RIGHTS – DEVELOPMENTS IN EUROPE, CENTRAL ASIA AND NORTH AMERICA IN THE AFTERMATH OF SEPTEMBER 11 (2003)*.

⁷² U.N. High Commissioner for Refugees, *Advisory Opinion on the Extraterritorial Application of Non-refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, <http://www.unhcr.org/4d9486929.pdf>. (This Opinion was prepared in response to a request for UNHCR's position on the extraterritorial application of *the non-refoulement* obligations under the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol. The Office's views as set out in the Advisory Opinion are offered in a broad perspective, given the relevance of the legal questions involved in a variety of situations outside a State's national territory.)

B. Limitations of Non-Refoulement

Therefore, the only possible exception to non-refoulement seems to be that the State does not recognize the people entering into its territory as ‘refugees’ and regards them merely as illegal migrants. The exclusion regime under Article 1(F) of the Refugee Convention permits such exclusion on 3 grounds - international crime or, serious non-political crime or, violation of the purposes and principles of the United Nations. As discussed above, it is the domestic law that gives the status of ‘refugee’ in all instances. However, even in situations where the persons are not recognized as refugees and are repatriated as illegal migrants, the State would be violating its international obligation. The major reason being that in almost all the situations, there would be a high probability that the migrant, upon repatriation, would be subjected to inhuman or degrading treatment or even torture. Hence, the human rights obligations would follow.

It has been suggested by some scholars⁷³ that the obligation of non-refoulement may also be recognized as *jus cogens* obligation.⁷⁴ The question, however, remains as to the source of this *jus cogens* character of the non-refoulement norm. Whether *jus cogens* nature can also arise from treaty law? Alexander Orakhelashvili observes that *jus cogens* norms can spring from multilateral treaties as well. He observes, “The ILC has endorsed the idea that general multilateral treaties can give rise to peremptory norms, and that there is some doctrinal and practical support for the view that multilateral treaties can be among the sources of *jus cogens*.”⁷⁵

Therefore, it does not matter as to what is the basis of non-derogability in non-refoulement obligation, its contents, and exceptions. What matters is the *jus cogens* character of the obligation. The norm therefore, creates an obligation even upon States like India, which may not be party to the Refugee Convention but

⁷³ ALEXANDER ORAKHELASHVILI, PEREMPTORY NORMS IN INTERNATIONAL LAW (2006); Jean Allain, *The Jus Cogens Nature of Non-Refoulement*, 13(4) INT’L J. REF. L. 533 (2001); Erika Feller, *Asylum, Migration and Refugee Protection: Realities, Myths and the Promise of Things to Come*, 18 INT’L J. REF. L. 509, 523 (2006) (calling non-refoulement “the most fundamental of all refugee law obligations”). However, some authors do not agree to the peremptory status of non-refoulement, WILLIAM A. SCHABAS, NON-REFOULEMENT, HUMAN RIGHTS AND INTERNATIONAL COOPERATION IN COUNTER-TERRORISM 7 (Leichtenstein 2006), (saying that “The arguments that non-refoulement is a *jus cogens* norm are not particularly convincing”). Cited in Duffy, *supra* note 46, at 377.

⁷⁴ Orakhelashvili, *supra* note 73, at 36). Orakhelashvili emphasises that the establishment of peremptory norms does not require judicial pronouncement; rather, *jus cogens* norms are created when a consensus emerges on two levels: first, on a categorical level focusing on the basic nature of peremptory norms and factors that make those norms peremptory; and second, at a normative level, examining whether a norm that categorically qualifies as part of *jus cogens* is so recognised under international law. See also, Alice Farmer, *Non-refoulement and Jus cogens: Limiting Anti-Terrorist Measures that Threaten Refugee Protection*, 23(1) GEO. IMMIGR. L. J., 1 (2008).

⁷⁵ Orakhelashvili, *supra* note 73, at 111.

have ratified human rights conventions, specifically the ICCPR.⁷⁶ However, this does not affect the customary nature of the *jus cogens* obligation.

C. National Security v. Non-refoulement

Non-refoulement principle does not allow derogability of any nature from itself. The only exception, which seems to be highlighted time and again, is under Article 33(2) of the Refugee Convention, which identifies some exception to the principle, as has already been discussed. There are some developments wherein the U.S. and the EU member States have shown ambivalence to the non-refoulement principle, stating the exception under Article 33(2) of the Refugee Convention on the grounds of national security.⁷⁷ However, the UNHCR has repeatedly stated that refugees and asylum seekers are often themselves fleeing from persecution, violence, forced displacement, and even terrorist acts, rather than being the perpetrators of terror.⁷⁸ It has, therefore, urged States to place greater priority on stemming the vilification, criminalization or stereotyping of asylum-seekers and refugees.⁷⁹ It has suggested that counter-terrorism measures should not undermine the core principles of the international refugee regime, including the right to seek asylum and the principle of non-refoulement.⁸⁰ In fact, there have been a number of U.N. Security Council and General Assembly Resolutions, since September 2001, which expressly call upon States to comply with their refugee obligations while undertaking counter-terrorism measures.⁸¹ UNHCR Representative on Terrorism, Vincent Cochetel observes,

⁷⁶ The emergence of non-refoulement as *jus cogens* and its relationship with Article 33(2) of the Convention is best captured by Article 64 of the Vienna Convention on the Law of Treaties, 1969, which in essence makes obligations contradicting with emerging *jus cogens* norm as non-existent and inoperative. However, we do not intend to agree to take this conclusion.

⁷⁷ Acer argues that the process of obtaining asylum has become more difficult for all asylum seekers because of “unsubstantiated claims that terrorists are trying to abuse the asylum system.” Eleanor Acer, *Refugees in an Insecure Time: Seeking Asylum in Post September 11 United States*, 28 *FORDHAM INT’L L. J.* 1361, 1363 (2005). Policies that favour national security above refugee protection have been adopted in both the U.S. and Europe. Selm, *supra* note 31. See, Farmer, *supra* note 74, for a more contextual discussion. On a more critical level Allain argues, “if so called ‘terrorist’ acts are to be considered as grounds for the denial of refugee status...then the content of the norm of non-refoulement is deprived of much of its content, thereby opening the door to the possibility of a return to persecution.” Cited in Allain, *supra* note 73, at 556.

⁷⁸ Remarks by Vincent Cochetel, Deputy Director of the Division of International Protection Services, United Nations High Commissioner for Refugees on ‘Terrorism as a Global Phenomenon’, UNHCR presentation to the Joint Seminar of the Strategic Committee on Immigration, Frontiers and Asylum (SCIFA) and Committee on Article 36 (CATS) organized by the Slovenian EU Presidency, Ljubljana, January 17-18, 2008, at 1-2.

⁷⁹ *Id.*

⁸⁰ Remarks by Vincent Cochetel, Deputy Director of the Division of International Protection Services, United Nations High Commissioner for Refugees on ‘Terrorism as a Global Phenomenon’, UNHCR presentation to the Joint Seminar of the Strategic Committee on Immigration, Frontiers and Asylum (SCIFA) and Committee on Article 36 (CATS) organized by the Slovenian EU Presidency, Ljubljana, January 17-18, 2008, at 6.

⁸¹ S.C. Res. 1269, (Oct. 19, 1999); S.C. Res. 1371, (Sept. 28, 2001); S.C. Res. 1456, (Jan 20, 2003); S.C. Res. 1535, (Mar. 26, 2004); S.C. Res. 1624, (Sept. 14, 2005). See also G.A. Res. 49/60, (Dec.

There is a clear perception in some quarters that asylum is misused to hide or provide safe haven for terrorists. Such perceptions are statistically and analytically unfounded, and must change. Terrorist attacks in Europe and elsewhere over the last ten years have shown that terrorists do not need to use the asylum channel to commit their criminal acts.⁸²

D. The Rohingya Argument in the Light of International Law - Revisited

Rohingyas in India are not deemed to be or described as refugees, rather they are considered as illegal migrants on the Indian soil.⁸³ As discussed above, even in such circumstances, the obligation of non-refoulement would operate since there are inherent dangers for their potential exposure to inhuman or degrading treatment, or even torture upon repatriation.⁸⁴ In the alternative, if the non-refoulement principle is considered as a part of customary law, exceptions would not be permitted from the obligation. The arguments in favour of exceptions to the non-refoulement obligation are also limited on the ground that national security cannot be extended as a blanket ban over a population. In fact, the UNHCR has shown concerns over the fact that some States apply exclusion criteria to non-refoulement on a collective basis rather than on the basis of individual assessment.⁸⁵

9, 2004); G.A. Res. 51/210, (Dec. 17, 1996); G.A. Res. 60/43, (Jan. 6, 2006); G.A. Res. 60/228, (Sept. 20, 2006). Cited in Remarks by Vincent Cochetel, Deputy Director of the Division of International Protection Services, United Nations High Commissioner for Refugees on 'Terrorism as a Global Phenomenon', UNHCR presentation to the Joint Seminar of the Strategic Committee on Immigration, Frontiers and Asylum (SCIFA) and Committee on Article 36 (CATS) organized by the Slovenian EU Presidency, Ljubljana, January 17-18, 2008, at footnote no. 1, at p. 2.

⁸² *Id.*

⁸³ In this context, it seems important to emphasize that the right to 'seek and enjoy asylum' is a fundamental principle of international law. See, Article 14, Universal Declaration of Human Rights, 1948 and also see Article 14(4), EU Qualification Directive.

⁸⁴ Reports suggest grave atrocities against Rohingyas in Myanmar. For instance see *Burma: Rohingya Describe Military Atrocities: Military's 'Unfinished Business' Has Hallmarks of 'Ethnic Cleansing'*, HUMAN RIGHTS WATCH, (Sept. 8, 2017), <https://www.hrw.org/news/2017/09/08/burma-rohingya-describe-military-atrocities>; *Rohingya crisis: Amnesty accuses Myanmar of Crimes Against Humanity*, THE GUARDIAN NEWSPAPER, (Oct. 18, 2017), <https://www.theguardian.com/world/2017/oct/18/amnesty-alleges-crimes-against-humanity-in-myanmar-against-rohingya>; *"All of My Body Was Pain": Sexual Violence against Rohingya Women and Girls in Burma*, HUMAN RIGHTS WATCH REPORT, (Nov. 16, 2017) <https://www.hrw.org/report/2017/11/16/all-my-body-was-pain/sexual-violence-against-rohingya-women-and-girls-burma>.

⁸⁵ Remarks by Vincent Cochetel, Deputy Director of the Division of International Protection Services, United Nations High Commissioner for Refugees on 'Terrorism as a Global Phenomenon', UNHCR presentation to the Joint Seminar of the Strategic Committee on Immigration, Frontiers and Asylum (SCIFA) and Committee on Article 36 (CATS) organized by the Slovenian EU Presidency, Ljubljana, January 17-18, 2008, at 4.

India's obligations towards refugees do not stem from the Refugee Convention; rather, they stem from either customary law or human rights treaties as discussed above. Both these sources of obligations lead to non-refoulement having a *jus cogens* character as observed. Therefore, in this context, it seems difficult to understand national security as an argument against non-refoulement. The arguments around national security also seem flawed on the ground that in effect, they seem to be extended over a population, in the immediate case, Rohingya refugees. This is not permitted, for human rights treaties demand individual assessment of cases and do not envisage a blanket generalisation.⁸⁶

IV. THE RESPONSE OF INTERNATIONAL LAW: CONTESTATIONS AND FAULT-LINES

In this part, the paper discusses the response of international law to the problem of refugees. It is important to highlight that the response of any legal system to real life problems would be limited by two factors. First, how the various definitions in the legal system operate. There is always subjectivity in the application of these definitions. The subjectivity creeps in when we compare the substance of these definitions against their understanding and application by the legal actors.⁸⁷ For present purposes, the theoretical understandings about sovereignty, territory, jurisdiction etc. in international law would be different from the manner in which the same terms are employed by the States.⁸⁸ The paper discusses them as the problem of 'Contestation'. Second, while international law responds, for instance, to the problems of refugees, some of its limits are exposed. Generally, these limits operate at the level of application of international law. However, sometimes they may also operate at the very foundation of international law. In such instances, it appears as though the very 'foundational myths',⁸⁹ upon which international law is based, have certain inherent limitations - for instance, limitations built around the conceptions of State sovereignty, nationality, territory,

⁸⁶ One of the reasons is because refugee status and protection, and non-refoulement obligation are closely linked with human rights obligations. Interestingly, human rights obligations are not merely substantive but also procedural, which call for procedural fairness and due process of law.

⁸⁷ Thomas M. Franck, *Fairness in International Law and Institutions* 6 (1995) cited in Joshua Kleinfeld, *Skeptical Internationalism: A Study of Whether International Law Is Law*, 78 *FORDHAM L. REV.* 2451, 2454 (2010). "The questions to which the international lawyer must now be prepared to respond, in this post-ontological era, are different from the traditional inquiry: whether international law is law. Instead, we are now asked: Is international law effective? Is it enforceable? Is it understood? And the most important question: Is international law fair?"

⁸⁸ "Law operates, or should operate, on the basis of social reality, but it is the product of human imagination. Often reality and imagination do not mesh." See eg., Alan Watson, *Authority and Law* (Stockholm, 2003) cited in Alan Watson, *Legal Culture v. Legal Tradition*, in, *EPISTEMOLOGY AND METHODOLOGY OF COMPARATIVE LAW 1* (Mark Van Hoecke ed., 2005).

⁸⁹ Martha Fineman notes, "every society has its own foundational myths which are associated with its origin and its national character." MARTHA FINEMAN, *THE AUTONOMY MYTH* 11 (2004). It is these foundational myths that form the foundation of the legal and political systems.

jurisdiction, legal obligation etc. The paper discusses these foundational limitations of international law as ‘Fault-lines’.⁹⁰

A. State Sovereignty

(a) Contestations

The assumptions about sovereignty allow States to create legal obligations at international plane and since there is no law-making authority, it is the agreements between States that create obligations. Moreover, since States are sovereign and independent, all the other extensions of sovereign authority have to necessarily be its derivative.⁹¹ This also generates the idea of exclusiveness, where the components of Statehood would exclusively be under the control of the State.⁹² The ‘contestations’ concerning State sovereignty arise from the very nature of international law. Where on one hand, it is constructed over the positive actions of States; on the other hand, it is imagined over the natural law assumptions about law.⁹³ Where human rights treaties are the result of positive law, human rights as an aspiration is based in natural law.⁹⁴ Where domestic jurisdiction is

⁹⁰ MARTTI KOSKENNIEMI, *FROM APOLOGY TO UTOPIA* 3 (2005). (Martti Koskenniemi observes that there is an inherent complexity in the manner in which both theories and doctrines are constructed. The ‘theoretical’ understandings about international law are problematic since they end up creating opposing positions of naturalism/positivism or idealism/realism. On the other hand, in everyday life of international law, the ‘doctrinal’ outcomes seem irrelevant since the behaviour of States seems to be based on informal, political practices, arguments, and understandings of the States. Therefore, “in order to avoid the problems of theory, the lawyer has retreated into doctrine. But doctrine constantly reproduces problems which seem capable of resolution only if one takes a theoretical position.”)

⁹¹ For instance, the powers of international organizations are seen as derivative of the powers that States confer upon them through the constitutive document that establishes them. See JAN KLABBERS, *AN INTRODUCTION TO INTERNATIONAL INSTITUTIONAL LAW*, (1st ed., 2002), for a discussion on theories of powers of international organizations.

⁹² Article 1 of Montevideo Convention on the Rights and Duties of States, 1933 provides 4 criteria defining Statehood – permanent population, defined territory, government, and capacity to enter into relations with other States. See Francis Boyle, *The Creation of the State of Palestine*, 1 EUR. J. INT’L L. 301 (1990); James Crawford, *The Creation of the State of Palestine*, EUR. J. INT’L L. 307 (1990), for an interesting debate over Statehood between Professors Francis Boyle and James Crawford. See also Thomas D. Grant, *Defining Statehood: The Montevideo Convention and Its Discontents*, 37 COLUM. J. TRANSNAT’L L. 403 (1998-99).

⁹³ “A survey of the history of international law locates the bases for migrant rights (alongside other human rights claims) in natural law traditions that predate the rise of ‘plenary power’ conceptions of sovereignty. Sovereignty and its relationship to territoriality and migration have mutated through the development of international law; in particular, the rights of foreigners under natural law traditions anticipate the rights of migrants emerging under contemporary international law.” Chantal Thomas, *What Does the Emerging International Law of Migration Mean for Sovereignty?*, 14 MELB. J. INT’L L. 18, (2013).

⁹⁴ M.W. Janis, *Individuals as Subjects of International Law*, 17 CORNELL INT’L L. J., 61 (1984). See also, J.L. BRIERLY, *THE LAW OF NATIONS: AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE*, (Sir Humphrey Waldock ed., 2nd ed., 1936).

based in positive law, universal jurisdiction is based in natural law.⁹⁵ These contestations create difficulties in the operation of international law.⁹⁶ States are sovereign but are assumed to be bound by the assumptions of limitations over their conduct.⁹⁷ While States can refuse to be party to any human rights instrument, they cannot refuse the operation of human rights standards within their domestic jurisdiction.⁹⁸ One interesting example can be the emerging concept/norm of Responsibility to Protect ('RtoP').⁹⁹ Leaving aside its limitations, lacuna, and ill uses,¹⁰⁰ the concept/norm demonstrates how sovereignty can be a limitation in itself – sovereignty as responsibility.¹⁰¹ The contestations in the context of RtoP, continue to exist – how to translate sovereignty in responsibility?¹⁰² How to define contours of this responsibility?¹⁰³ Whether to make it responsibility of

⁹⁵ For a detailed account on jurisdiction of all nature in international law, see Michael Akehurst, *Jurisdiction in International Law*, 46 *Brit. Y. B. Int'l L.* 145 1972-1973.

⁹⁶ See JAN KLABBERS, *AN INTRODUCTION TO INTERNATIONAL INSTITUTIONAL LAW*, 3-7 (1st ed., 2002).

⁹⁷ States, even though sovereign are also equal. Where sovereignty allows for self-assertion of their identities, equality brings order in the international society. Therefore, States even though are sovereign, their authority is self-limited to create international community of nations. See generally, Brierly, *supra* note 94.

⁹⁸ For instance, see, Louis Henkin, *Human Rights and State "Sovereignty"*, 25 *GA. J. INT'L & COMP. L.* 31, 37 (1995-96). Also see, Anthony D' Amato, *Human Rights as Part of Customary International Law: A Plea for Change of Paradigms*, 25 *GA. J. INT'L & COMP. L.* 47 (1995-96).

⁹⁹ The idea behind the controversial 'Responsibility to Protect' norm is that every State has the primary responsibility to protect its population from gross human rights violations, viz. genocide, war crimes, ethnic cleansing, and crimes against humanity within its territory. In case the State is unable to do that, the responsibility shifts to the international community to protect the population from such gross violations. For a detailed account of the genesis and development of the concept and the norm visit INTERNATIONAL COALITION FOR RESPONSIBILITY TO PROTECT (ICRtoP), <http://www.responsibilitytoprotect.org/> (last visited Feb. 28, 2018).

¹⁰⁰ It is seen as a new form of military intervention (humanitarian intervention) by many. For instance, see, V.S. Mani, *Humanitarian Intervention Today*, 313 *COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW*, . http://dx.doi.org/10.1163/1875-8096_pp1rdc_ej.9789004145559.009_323.

¹⁰¹ For an overview of the relevant documents see, *The Responsibility to Protect* (December 2001), *Report of the International Commission on Intervention and State Sovereignty; The High-level Panel on Threats, Challenges and Change, "A More Secure World, Our Shared Responsibility"* (December 2004); *The Secretary-General, "In Larger Freedom: Towards Development, Security and Human Rights for All"* (2005); *Responsibility to Protect in the 2005 World Summit Outcome Document*; *Secretary General Ban ki-moon's Berlin Speech*; *Secretary-General Ban Ki-moon's Reports on RtoP - 2009 Report: Implementing the Responsibility to Protect*; *2010 Report: Early Warning, Assessment, and the Responsibility to Protect*; *2011 Report: The Role of Regional and Sub-regional arrangements in Implementing the Responsibility to Protect*; *2012 Report: Responsibility to Protect – Timely and Decisive Response*; *2013 Report: State Responsibility and Prevention*; *2014 Report: Responsibility to Protect: International Assistance*; *2015 Report: A Vital and Enduring Commitment: Implementing the Responsibility to Protect*, available at <http://responsibilitytoprotect.org/index.php/about-rtop/core-rtop-documents>.

¹⁰² For instance, see, ANNE ORFORD, *READING HUMANITARIAN INTERVENTION: HUMAN RIGHTS AND THE USE OF FORCE IN INTERNATIONAL LAW* (2003); ANNE ORFORD, *INTERNATIONAL AUTHORITY AND THE RESPONSIBILITY TO PROTECT* (2011).

¹⁰³ See, *Secretary-General Ban Ki-moon's Reports on RtoP - 2009 Report: Implementing the Responsibility to Protect*; *2010 Report: Early Warning, Assessment, and the Responsibility to Protect*; *2011 Report: The Role of Regional and Sub-regional arrangements in Implementing the Responsibility to Protect*; *2012 Report: Responsibility to Protect – Timely and Decisive*

conduct or of implication?¹⁰⁴ The concept attempts to connect the relevant dots – State sovereignty, human rights, criminal law, conduct of international organizations, domestic behaviour of the States etc. However, it gets stuck at various levels – institutional and democratic deficit within United Nations, where only few States enjoy disproportionate power; international politics, for instance many countries in South Asia, including India, do not support RtoP because of the accountability deficit it brings in intervention processes; fragile state of international legal order; and, changing notions of State sovereignty.¹⁰⁵

(b) Fault-lines

From the Rohingya perspective, it becomes difficult to place national security as a derivative of State sovereignty on one hand, and against non-refoulement based in general consensus of the international community, on the other. It also poses problems in fulfilling obligations, which the member States might perceive to be against their national interests. This only results in Rohingya refugees from the protection of international legal framework. The threat to national security results in violation of core values of human dignity¹⁰⁶ and human security.¹⁰⁷ This is the first fault-line, for it seems that the values of international law are being ignored at the cost of its working. In the alternative, where State actions drive international law, values for a better world should guide its path.

Response; 2013 Report: State Responsibility and Prevention; 2014 Report: Responsibility to Protect: International Assistance; 2015 Report: A Vital and Enduring Commitment: Implementing the Responsibility to Protect, *available at* <http://responsibilitytoprotect.org/index.php/about-rtop/core-rtop-documents>.

¹⁰⁴ It is important to understand the nature of responsibility – whether it is positive or negative. For instance, the International Law Commission's Articles on State Responsibility, 2001 define responsibility in negative connotation, i.e., it defines responsibility in terms of implication which State action brings and not in terms of conduct which defines behaviour of the State. In other words, it deals with secondary obligations (obligations of implication) and not the primary (obligation of conduct).

¹⁰⁵ For more, see, Dabiru Sridhar Patnaik, *International Law and Responsibility to Protect: South Asian Perspective*, ASIAN PERSPECTIVES ON HUMANITARIAN INTERVENTIONS IN THE 21ST CENTURY: AN OCCASIONAL SUPPLEMENT TO JOURNAL OF GLOBAL STUDIES, 175 (2013).

¹⁰⁶ McCrudden observes, "Due significantly to its centrality in both the United Nations Charter and the Universal Declaration of Human Rights, the concept of 'human dignity' now plays a central role in human rights discourse. The International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR) both state that all human rights derive from the inherent dignity of the human person." Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19(4) EUR. J. INT'L L. 655, 656 (2008). See also, D. KRETZMER AND E. KLEIN, THE CONCEPT OF HUMAN DIGNITY IN HUMAN RIGHTS DISCOURSE (2002).

¹⁰⁷ See generally, United Nations Development Programme, *Human Development Report 1994: New Dimensions of Human Security* (1994), http://hdr.undp.org/sites/default/files/reports/255/hdr_1994_en_complete_nostats.pdf; Commission on Human Security, *Human Security Now* (2003), <https://reliefweb.int/sites/reliefweb.int/files/resources/91BAEEDBA50C-6907C1256D19006A9353-chs-security-may03.pdf>; U.N.G.A. Thematic Debate on Human Security, (May 22, 2008), <http://www.unocha.org/sites/dms/HSU/Publications%20and%20Products/GA%20Resolutions%20and%20Debate%20Summaries/GA%20Thematic%20Debate%20on%20HS%20-%20May%202008%20for%20website.pdf>.

B. Nationality

(a) Contestations

The ideas of nationality are based in the membership of a community.¹⁰⁸ This is one of the reasons why nationhood and Statehood are two different things.¹⁰⁹ Nationhood is a psychological factor, which feeds into one's identity and is based in membership of a community,¹¹⁰ while Statehood is a more technically constructed ideal.¹¹¹ The problem occurs when both the ideas do not coincide. What would happen if there were more than one nation in a State?¹¹² Similarly, what would happen when the membership as to nationhood is made inclusive for some, while exclusive for others?¹¹³ People who cross the border to arrive in a different State might face problems as to their national identities, especially in instances

¹⁰⁸ The very criteria of population and territory as two foundational basis of Statehood give the message that nationality is based in membership of a population, which lives in a defined territory. It is only this population which would seek protection and enrichment from the government, and for and through whom international relations would be forged. *See*, Montevideo Convention on the Rights and Duties of States art. 1, Dec. 26, 1933, 165 L.N.T.S. 19, for a general idea about the criteria for Statehood. For a more critical view on nationality *see*, HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 294 (1951). (Arendt identified the 'right to have rights'. She observes that by virtue of being expelled from State, Stateless people also seem to lose their humanity. In her own words, "Man, it turns out, can lose all so called Rights of Man without losing his essential quality as a man...only a loss of a polity itself expels him from humanity"). Cited in Thomas, *supra* note 93, at 393.

¹⁰⁹ Thomas identifies three paradoxes in the concept of nationality. First paradox is that Statehood is based in membership and excludes non-members. Second paradox is that Stateless persons seem to be both proximate and marginal to the institutional framework of the State. Third paradox is that despite migrant's juridical and epistemic marginality, globalisation brings him more prominently into view. Thomas, *supra* note 93, at 395.

¹¹⁰ The concepts 'national' and 'alien actually' contextualise the membership criteria – the migrant as outsider is both excluded from and necessary to the nation-State. The exercise of foreigners, being non-members, validates and gives value to the modern concept of a membership society: the social contract. BONNIE HONIG, *DEMOCRACY AND THE FOREIGNER* (2001). Cited in Thomas, *supra* note 93, at 395.

¹¹¹ *See* Brierly, *supra* note 94, for a general understanding.

¹¹² There are a number of examples evincing claims of different nations within a State. For instance, the partition of India and Pakistan was suggestively based in 'Two Nation Theory' supported both by Veer Damodar Savarkar, the ideologue of Rashtriya Swayamsevak Sangh (RSS) and Mohammad Ali Jinnah, who later became the founding father of Pakistan. , *See*, A.G. Noorani, *The Partition of India*, 18(26) *FRONTLINE MAGAZINE* (2002), <http://www.frontline.in/static/html/fl1826/18260810.htm>, for more details. Similar issues concern with respect to the Israel-Palestine Conflict wherein two States based on two nations have been proposed.

¹¹³ The right of exclusion [from nationality] has been understood variously as physical exclusion from territorial boundaries and political exclusion from civic life and citizenship. Thomas, *supra* note 93, at 19. *See also* LINDA BOSNIAK, *THE CITIZEN AND THE ALIEN: DILEMMAS OF CONTEMPORARY MEMBERSHIP* 34 (2006). On totally different lines, upon State succession, besides defining the fate of properties, debts, and liabilities etc. nationality also becomes a major issue of concern. How does international law deal with the complexities in nationality in this regard? *See*, AKEHURST'S *MODERN INTRODUCTION TO INTERNATIONAL LAW*, 169 (Peter Malanczuk ed., 7th ed., 1997), for a general understanding.

where migration is the result of a conflict situation.¹¹⁴ It is even more interesting to understand how the notion of Statehood derives its sustenance from nationhood.¹¹⁵ Both international law and domestic law protect and promote nationalities, not only of entities¹¹⁶ but also of interests.¹¹⁷ In such situations, people who cross the borders, and who cannot be part of the national identity end up as non-members, non-citizens, and illegal migrants.¹¹⁸ The State decides whether to absorb them as a national or to continue treating them as illegal persons.

(b) Fault-lines

From the perspective of Rohingyas, the issues in nationality remain central. They are fleeing persecution from a territory where they are themselves regarded as illegal migrants. The territories where they have entered have yet again not recognized them as refugees. Though refugee status under law does not grant as much protection as nationality does, the denial of even refugee status remains a deep concern. Therefore, international law seems to insulate its working from the effects. Thus, the second fault-line for international legal discourse is its inability to provide for the basic protection of common men and women around the world. It needs to remedy the constructs like ‘nationality’, which isolate the non-national elements from legal discourse. Identifying ‘basic human needs’ as more fundamental than ‘identities’ would probably provide better solutions.¹¹⁹

¹¹⁴ Upon State succession, there is a movement of populations across borders and therefore, based upon one’s location, nationality is granted. There were instances during India-Pakistan partition where people who crossed borders, or found on the other side were deemed to lose their original nationality and acquire the other. For more see, Sarah Ansari, *Subjects or Citizens? India, Pakistan and the 1948 British Nationality Act*, 41(2) J. IMPERIAL & COMMONWEALTH HIST. 285 (2013).

¹¹⁵ See, Montevideo Convention on the Rights and Duties of States art. 1, Dec. 26, 1933, 165 L.N.T.S. 19.

¹¹⁶ Nationality of persons, nationality of companies, nationality of ships/aircrafts, nationality of property upon succession (archives, public property etc.), nationality of property with State through nationalisation etc. are some of the examples of nationality of entities.

¹¹⁷ Issues in national security are based in national interests of the State. The other example could be public policy clauses invoked quite frequently in arbitration matters. For public policy issues in Arbitration in India see, *Renusagar Power Co. Ltd. v. General Electric Co.*, 1994 Supp (1) SCC 644 : AIR 1994 SC 860; *ONGC v. Saw Pipes Ltd.*, (2003) 5 SCC 705 : AIR 2003 SC 2629; *Venture Global Engg. v. Satyam Computer Services Ltd.*, (2008) 4 SCC 190 : AIR 2008 SC 1061.

¹¹⁸ One of the worst examples is the growing Statelessness around the world on account of rise in international conflicts. Rohingya refugee problem is one such example from South Asia and South-East Asia.

¹¹⁹ According to Oxfam, *An Economy for the 99 Percent* (2017), only 08 persons hold as much wealth as around 3.6 billion people, which constitutes around half of the world’s population. More than a billion of this population lives on less than \$2 a day. Against this backdrop, human rights framework is seen as exacerbating inequalities around the world. According to scholars like Thomas Pogge, international legal system seems to be organized in a manner which contributes in the persistence of severe poverty, where international institutions like WTO, IMF, World Bank merely contribute in the continuance of inequalities around the world. However, there seems to be a great mismatch here, for United Nations Sustainable Development Goals (SDGs), on the other hand, also aim to eradicate poverty and hunger by 2030. See generally, Thomas

C. Territoriality

(a) Contestations

Territoriality is another concept over which deep contestations exist in international law.¹²⁰ The jurisdiction of State is based in territoriality and nationality both. Where Civil law countries are more inclined towards nationality basis of application of law, in Common law countries it is territoriality, which finds precedence in domestic legal systems.¹²¹ What would happen to people who are neither nationals of any State, nor within the territory of their domicile? In such situations, these people would end up being recognised as Stateless persons. They are Stateless in all the senses - absence of national identity documents would make them Stateless; leaving their territory and seeking entry into another would also make them Stateless.¹²² Similar limitations over assertions of national identity might also render people Stateless.¹²³ Interestingly, even the aspirations of universality in international law operate through the medium of State.¹²⁴ Hence, Stateless persons would continue to live beyond the realms of even the most universal assertions of law, i.e., enjoyment of human rights, prohibition of attacks against life and dignity etc.¹²⁵

Pogge, *Are We Violating the Human Rights of the World's Poor?*, 14 *ETHICAL ISSUES IN POVERTY ALLEVIATION, STUDIES IN GLOBAL JUSTICE* 17 (H.P. Gaisbauer et al. eds., 2016).

¹²⁰ Anna Stilz, *Nations, States, and Territory* 121 *ETHICS* 572, 574 (2011). (Anna Stilz offers a 'legitimate State theory', setting forth normative justifications for territorial jurisdiction. She holds that: "a State has rights to a territory if and only if it meets the following four conditions: (a) it effectively implements a system of law regulating property there; (b) its subjects have claims to occupy the territory; (c) its system of law 'rules in the name of the people,' by protecting basic rights and providing for political participation; and (d) the State is not a usurper."). Traditional international law places emphasis upon the authority of State over the territory and the population which is evidenced through the presence of a functional government. "It is this 'requirement that a putative State have an effective government' more than any of the other three in the classic Montevideo Convention formula, that is 'central' to the 'claim to statehood' and therefore determinative of sovereignty." Cited in Thomas, *supra* note 93, at 414. See also, JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 55 (2nd ed., 2006).

¹²¹ Traditionally, nationality principle was more prevalently used by Civil law countries. However, recently Common law countries have also started to adopt it. For instance, War Crimes Act, 1991 and the Sex Offenders Act, 1997 adopted in Britain talk about nationality.

¹²² This highlights the typical situation of Rohingya refugees. Most of them are domiciled in Rakhine State of Myanmar but not regarded as nationals of Myanmar and are persecuted. In that situation, they cross borders and enter countries like India and Bangladesh, where again they are seen as illegal migrants.

¹²³ For instance, Tibetan refugees in India see themselves as Stateless due to lack or recognition of their assertions of national identity through Tibetan State.

¹²⁴ Even in instances where the international norms of universal character are to be applied, it is through the medium of State that they become applicable. For example, even if human rights are universal, their protection, enjoyment, and assertion demand the machinery of State. Therefore, without national identity it becomes extremely difficult for international law to provide protection to Stateless people.

¹²⁵ International crimes of universal jurisdiction, for example war crimes, ethnic cleansing, and crimes against humanity etc., look at human beings collectively. Therefore, individual violations of human rights of Stateless people like Rohingyas would go unaddressed. As indicated, we need

(b) Fault-lines

Therefore, Rohingya refugees do not merely remain vulnerable as to their identity; they are also fragile from the perspective of the ‘remedies’ under law. Since, the remedies in both national law and international law operate through the route of nationality, a sufficiently identifiable population of Rohingyas in the world is seen to be beyond the bounds of legal protection, for in such instances, the benefits of territoriality do not accrue to them. International law fails to construct a universal language, which would provide access and protection to the people of the world generally. The third fault-line is the absence of international legal order, which could extend legal protection to people around the world, both individually and collectively, regardless of their location.

D. Jurisdiction

(a) Contestations

Jurisdiction in law is based on the ideas about claims of sovereignty.¹²⁶ It would be important to understand that jurisdiction is merely a claim, which if successful, allows the operation of law. Therefore, for the operation of law, it is necessary that there should be some claims of jurisdiction. Hence, these claims of jurisdiction are based on some connection between the entity or the event over which jurisdiction is claimed, and the State. However, in situations where there are no claims, can there be any jurisdiction? The answer unfortunately would be that there exists no jurisdiction.¹²⁷ Further, jurisdictional claims are based in legal systems, if one legal system does not make a claim, the other can always do so.¹²⁸ This means that if the jurisdiction is not arising out of a domestic legal system,

the machinery of the State to provide such safeguards, which only operates through the medium of nationality.

¹²⁶ AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW, 169 (Peter Malanczuk ed., 7th ed., 1997). (“...most often ‘jurisdiction’ refers to powers exercised by a state over persons, property, or events.”). For a detailed discussion over jurisdiction see, Michael Akehurst, *Jurisdiction in International Law*, 46 BRIT. Y.B. INT’L L 145 (1972) Vol. 46, 145. Also see, Alex Mills, *Rethinking Jurisdiction in International Law*, 84(1) BRIT. Y.B. INT’L L. 187 (2014).

¹²⁷ The claims of jurisdiction, as suggested, are based in persons, property, or events. In the absence of any such connect, jurisdiction cannot be claimed.

¹²⁸ This happens in situations where there may be multiple possibilities of claims of jurisdiction. For instance, claims of universal jurisdiction over piracy at high seas can be invoked by any State. Alternatively, in situations where more than one State makes a claim, international law works as a mediator and resolves the conflict of jurisdiction. For instance, in *The Case of S.S. Lotus (France v. Turkey)* Judgment, 1927 P.C.I.J. (ser. A) No. 10, at 25. (The Permanent Court of International Justice observed that international rules over jurisdiction are permissive in their character and therefore, do not restrict States from exercising jurisdiction, in situations of conflicting jurisdictional claims and in matters over which jurisdiction could be claimed. It observed, “If, therefore, a guilty act committed on the high seas produces its effects on a vessel flying another flag or in foreign territory, the same principles must be applied as if the territories of two different States were concerned, and the conclusion must therefore be drawn that there is no rule

it can always arise out of the international legal system.¹²⁹ For instance, acts of genocide may not be recognised under domestic law but they are well identified by international law. In such situations, to attract standards of genocide, it would be required that invocation is made in international law.¹³⁰ Similar complexities would arise here again. Whatever may be the source of the conferral of jurisdiction – domestic law or international law, the essence lies in making a claim.¹³¹ From the perspective of Stateless people, the most difficult task therefore, is to identify the existence of jurisdictional claims.

(b) *Fault-lines*

For instance, in case of Rohingyas, the protection needs to arise from claims of jurisdiction. Since the jurisdictional claims, which protect nationals of a State from violation of his/her human right, come only from the State, Stateless people cannot afford to have that benefit. Therefore, the only claim of protection, which could be made in case of Rohingyas is in the nature of ‘concern’. In such situations, international law cannot come to the rescue of Rohingyas since they are Stateless. They need to be accorded refugee protection, only then international obligations of States could flow. Therefore, the fourth fault-line is the inability of international legal discourse to translate immediate ‘concerns’ into immediate ‘actions’.

of international law prohibiting the State to which the ship on which the effects of the offence have taken place belongs, from regarding the offence as having been committed in its territory and prosecuting, accordingly, the delinquent.”

¹²⁹ Under traditional international law, since States are sovereign, they are free to exercise jurisdiction over any person, territory, or event which affects their sovereign interests. The jurisdiction therefore, is normally conferred upon States by their domestic legal systems. However, in many instances, acts may not be categorized as a civil wrong or criminal by the domestic legal systems, for instance, crimes of genocide, war crimes etc. In such situations, international law confers jurisdiction upon the States to try individuals for their acts. Therefore, in all these situations, as already mentioned above, international law is permissive.

¹³⁰ In all such circumstances, it is the domestic legal system which provides required mechanisms to prosecute or sentence the individual, starting from his arrest to his trial. The domestic legal system aids in implementing the international obligation, keeping in mind both the substantive elements as to defining the wrongful act, and providing necessary procedural safeguards like due process, reasonable restrictions etc.

¹³¹ The essence of making a claim can also be seen in instances where immunity from jurisdiction is involved. In situations where one State claims jurisdiction and exercises it, the other State will have to make a claim of immunity on the basis of relevant grounds. In the absence of such claim, the first State may always go forward. However, here again two situations might arise – first, where the immunity is based in international law, for instance ambassadors and diplomats; second, where the immunity arises from the State, in instances where the individual or entity performs functions of the State. It is in the second instance that immunity has to be claimed.

E. Legal Obligations

(a) Contestations

Most of the obligations in international law arise either from treaty law or from customary law.¹³² It would therefore be necessary to discuss the inherent contestations in both the sources of law. It is interesting to understand that treaty making, though an executive act has legislative implications.¹³³ It is the decision of the executive based upon which, the State signs or ratifies or even refuses to undertake an international obligation.¹³⁴ The engagement of legislative arm of the State depends upon the constitutional scheme provided for entering into international commitments.¹³⁵ In case of India, the legislature has no role in the State undertaking an international obligation or refusing to take any commitment.¹³⁶

¹³² Article 38(1) of the International Court of Justice Statute, in its illustrative capacity, also recognizes General Principles of Law as a source of international law. These principles in their nature are a part of the international legal system and therefore in most instances do not give rise to substantive content of law. H. HART, *THE CONCEPT OF LAW* (1961). (Hart observes, “The general principles are principles essentially independent of all other legal systems, being a part of the international legal system coincidentally similar in content to some of the basic principles of municipal systems of law, since law as a system of rules shares some characteristics with law as custom and consent.”) See also, Stephen C. Hicks, *International Order and Article 38(1)(c) of the Statute of the International Court of Justice*, 2 *SUFFOLK TRANSNAT’L L.J.* 1 (1978).

¹³³ Article 27 of the Vienna Convention on the Law of Treaties, 1969 holds that a State party to a treaty may not be allowed to invoke the provisions of its internal law as justification for its failure to perform a treaty. Therefore, in such circumstances, any obligation taken over by a State through ratification or definitive signature (where mere signing of treaty creates obligations) would bind it internationally, even though it has not passed a formal law through its legislature.

¹³⁴ Vienna Convention on the Law of Treaties, 1969 itself makes it very clear that the act of treaty making is done through the Government of the State. For instance, Article 7(2) mentions that the Head of State, Head of Government, or Minister for Foreign Affairs do not require instrument of Full Powers to bind the State through treaty-making. The act of treaty-making here implies both signature and ratification. In fact, it is the government which represents a State in all its dealings internationally. See, Annebeth Rosenboom, *Practical Aspects of Treaty Law: The Depository Functions of the Secretary General*, UNITED NATIONS AUDIO VISUAL LIBRARY OF INTERNATIONAL LAW for more details on Treaty-making.

¹³⁵ Treaty making in India is an executive function of the Union under Article 73 read with Article 246 of the Constitution in light of item 14 of Union List in the Seventh Schedule of the Indian Constitution. *LAW AND PRACTICE CONCERNING THE CONCLUSION OF TREATIES*, at 63, U.N. Doc. ST/LEG/SER.B/3, U.N. Sales No. 1952.V.4 (1953). (The Government of India has made the following statement on treaty making power of the executive: “Parliament has not made any laws so far on the subject [of treaties] and until it does so, the President’s power to enter into treaties remains unfettered by any internal constitutional restrictions...In practice, the President does not negotiate and conclude a treaty or agreement himself. Plenipotentiaries are appointed for this purpose and they act under full powers issued by the President. It is however, a President who ratifies a treaty”.)

¹³⁶ There have been notable discussions on this issue in the Parliament of India. For instance, National Commission to Review the Working of the Constitution *A Consultation Paper on -Treaty Making Power Under Our Constitution* (2001), ¶45, available at <http://lawmin.nic.in/ncrwc/finalreport/v2b2-3.htm> (last visited February 28, 2018) (National Commission to Review the Working of the Constitution observes that during the Uruguay Round of negotiations, the members of the Parliament, including the Parliamentary Standing Committee opposed the

The Indian Constitution makes it very clear that it is the Executive that would undertake any international legal obligation.¹³⁷ Therefore, while creation of an obligation is an executive act on international plane, it more or less remains the prerogative of the legislature in the domestic sphere.¹³⁸ However, it does not mean that every international obligation would be based in individual State consent. In fact, it is the nature of the obligation that decides whether individual assent of the State is required or not.¹³⁹ For instance, since India has neither ratified Refugee Convention, 1951 and its Protocol, 1967, nor the Vienna Convention on the Law of Treaties, 1969, it seems that relevant information could be found in obligations concerning refugees from customary practices of law.¹⁴⁰ If the obligation is based in customary law, it automatically becomes operative in the domestic sphere of the State, especially in the Common law jurisdictions.¹⁴¹ However, this does not mean that the customary rule will apply without any semblance with national laws. It is understood that municipal law can put a restriction over the application of customary law through legislation.¹⁴² For instance, international crimes, which

signing of TRIPS Agreement by India. However, the Government of India signed TRIPS Agreement in 1994, without consulting the Parliamentary Committee again.). There have been many proposals for amending the relevant provisions of the Constitution and allowing legislative role in treaty making. However, none of them saw the light of the day, including the ‘Consultation and Ratification of Treaties Bill, 2011’ (Bill No. XXV of 2011), introduced in Rajya Sabha by Mr. Prakash Javadekar on August 5, 2011.

¹³⁷ As discussed above, treaty-making in India is an executive function of the Union under Article 73 read with Article 246 of the Constitution in light of item 14 of Union List in the Seventh Schedule of the Constitution of India.

¹³⁸ This happens in two forms – where signature and ratification is done by the executive independent of the legislature, the legal implications domestically would normally flow from legislative acts only, for instance, as in India. Justice V.R. Krishna Iyer in *Jolly George Varghese v. Bank of Cochin*, (1980) 2 SCC 360 (“...until the municipal law is changed to accommodate the Covenant [ICCPR] what binds the court is the former, not the latter.”). However, if the signature and/or ratification is done by the executive in consultation with the legislature, the legal implications from the executive act normally follow automatically, for instance as in the U.S.

¹³⁹ In customary law, it is individual State practice which is required to create a situation of ‘persistent objector’. However, it is the general practices of the States, as evidence of *opinio juris*, which creates custom. See Article 38(1) (b) of the ICJ Statute of 1945.

¹⁴⁰ India is not a party to Vienna Convention on Law of Treaties and hence, the treaty provisions can be viewed either in the form of customary international law, or the adoption of convenient guidelines. Vik Kanwar, *Treaty Interpretation in Indian Courts: Adherence, Coherence and Convergence*, DOMESTIC COURTS AND THE INTERPRETATION OF INTERNATIONAL LAW: CONVERGING APPROACHES? (Helmut Philipp Aust & Georg Nolte eds., 2015).

¹⁴¹ Under the Blackstone’s Doctrine in Common Law jurisdictions, it appears that the Law of Nations is part of the law of the land. However, the only condition is that there must be full evidence that the family of nations observes universally, a certain rule of customary law to make it applicable without any legislative enactment. Once the customary nature of the principle is identified, there remains no difficulty in its application. For instance, *Kamarajn v. State*, [1931] AIR (88) Madras 880. (In this case the High Court of Madras applied the principle that a foreign sovereign authority (the British Admiralty) cannot be sued in India. While arriving at this conclusion, the Court used both English Common law and the corresponding rules of the Law of Nations relating to the maritime belt, harbours, and estuaries.) See, C.H. Alexander, *International Law in India*, 1(3) INT’L & COMP. L.Q. 289 (1952), for more details.

¹⁴² One of the reasons being that the language of customary law never defines the contours of the concept, it merely identifies the existence of the obligation. Where such an obligation needs to be

have to be dealt with domestically, cannot be adjudged by the domestic courts in the absence of a legislation providing for both jurisdiction and punishment.¹⁴³ There are two different strands in this context – first, where the recognition and enforcement of customary rules of law is quite evident, for instance, in matters concerning law of the sea, State succession, obligations of States over individuals during armed conflicts,¹⁴⁴ second, where there exists a difficulty in enforcing the customary rules of law, for instance, piracy, jurisdictional immunity,¹⁴⁵ non-refoulement etc.¹⁴⁶ Therefore, Courts while ascertaining the nature of existing obligations, are concerned not merely with the existence of customary rules but also with its relationship with statutes; for instance, what is meant by the right to not be subjected to cruel and inhuman treatment.¹⁴⁷ Therefore, in such instances, the interpretative mechanisms become quite complex, and the results become conditional and subjective.¹⁴⁸

(b) Fault-lines

The fifth fault-line for international legal discourse relates to the existing gaps in the operation of law and the need to create a semblance between international law and domestic law. In situations where every international obligation operating for the benefit of people requires to be mediated through domestic legal framework, it remains highly relevant that both domestic and international law should have an understanding as to their operation. Where ‘nationality’ based benefits to entities remains a concern, as discussed above, the percolation of international obligations in domestic legal system continues to be the other major issue.

It is unanimously agreed that the primary obligation of non-refoulement exists, either through treaty law and customary law, or as a *jus cogens* obligation. On the contrary, there exists no secondary obligation in case the non-refoulement principle is violated. This kind of legal framework, wherein customary law or even *jus cogens* violation goes unaddressed, shows deep fault-lines in the legal structure. In fact, the weight of any obligation can be measured through its consequences. Since the obligation itself is so vague, the only remedy available is in the nature of ‘concern’, which in itself is a very loose term.

implemented, it is the domestic law which ends up defining its contours.

¹⁴³ Judge Kenneth Keith, Role of International Law in National Law, U.N. AUDIO VISUAL LIBRARY, http://legal.un.org/avl/ls/Keith_IL.html.

¹⁴⁴ *Id.*

¹⁴⁵ See, The “Enrica Lexie” Incident (*Italy v. India*), Case No. 24, Request for the prescription of provisional measures, Order of Aug. 24, 2015, https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.24_prov_meas/C24_Order_24.08.2015_orig_Eng.pdf.

¹⁴⁶ Keith, *supra* note 143.

¹⁴⁷ Keith, *supra* note 143.

¹⁴⁸ Since the customary obligations are dependent upon national interpretations for their implementation, the manner of their enforcement inherently creates subjectivity.

V. SOME PREFATORY REMARKS

The solution to the problem of refugee crisis around the world can only be an admixture of both law and policy initiatives, taken at both, the domestic and the international levels. With the growing interdependence among nations and the cross-cutting effects of migration across borders, it seems pertinent that international law be envisaged in a more meaningful manner. It would be better if the international community could come together to address some of the basic contestations around the understanding of international law and fill gaps in the fault-lines that are often exposed during its operation. 3 things gain the highest relevance in this regard. First, how to translate the international concerns of the world community to the domestic interests of the State, its territory and the population within it? This would also require an investigation of the intersection between law and policy at both international and domestic levels. Second, how to create a better understanding around the basic conceptions of international law – sovereignty, nationality, territory, jurisdiction, legal obligation etc., keeping in mind that the nature of international law has changed considerably with the expansion of both international activities and the diversification of international actors? Though the paper has addressed neither the expansion of international activities nor the diversification of international actors, it seems extremely relevant to mention them at least in the passing. Three, how to create more coherency in the ‘substance’ of international law by bringing, for instance, the discourses of public international law, international human rights law, refugee law etc. closer? In coming times, the development of international law, to a great extent, is dependent upon the answers to these questions. The more specific concerns — how to create a more efficient regime to protect refugees, dynamics of which this paper has considerably discussed, remain a sub-set of these bigger questions.

In this context, the efforts of the U.N. General Assembly in taking steps to counter the problems of global refugee crisis are a welcome step. The U.N. General Assembly’s high-level Summit for Refugees and Migrants, held in New York on September 19, 2016, was a historic development.¹⁴⁹ States, for the first time, sought to create a systematic framework to coordinate responses to large influxes of refugees, focusing on the roles and responsibilities of different actors, and the needs of those in flight over time. They “underline[d] the centrality of international cooperation to the refugee protection regime” and “recognise[d] the burdens that large movements of refugees place on national resources, especially in the case of developing countries.”¹⁵⁰ States also agreed to begin a series of consultations over the next two years, resulting in the adoption of a Global

¹⁴⁹ Elizabeth Ferris, *In Search of Commitments: The 2016 Refugee Summits* (Andrew & Renata Kaldor Centre for International Refugee Law Policy Brief No 3, November 2016), available at http://www.kaldorcentre.unsw.edu.au/sites/default/files/Policy_Brief_3_A4_final.pdf (last visited February 28, 2018).

¹⁵⁰ G.A. Res. 71/1, New York Declaration for Refugees and Migrants, ¶68 (Oct. 3, 2016).

Compact on Refugees, and a Global Compact on Safe, Orderly, and Regular Migration in 2018.¹⁵¹ It is encouraging to note that the Summit's outcome document, the non-binding New York Declaration, emphasizes the importance of international law as the guiding framework for finding 'long-term and sustainable solutions'.¹⁵² The Declaration calls for a multi-stakeholder approach to displacement, involving "national and local authorities, international organizations, international financial institutions, civil society partners (including faith-based organizations, diaspora organizations, and academia), the private sector, the media, and refugees themselves."¹⁵³ The Declaration commits to ensuring that refugee admission policies align with obligations under international law, and that administrative barriers are eased.¹⁵⁴ The Comprehensive Refugee Response Framework, annexed to the Declaration, provides a response blueprint, in that it seeks to set out in detail, the steps required by different actors at the outset of a large-scale influx. It draws on the lessons learnt and the practices known to be effective.¹⁵⁵

¹⁵¹ Jane McAdam, *The Enduring Relevance of the 1951 Refugee Convention*, 29 (1) INT'L J. REFUGEE L. 1 (2017).

¹⁵² G.A. Res. 71/1, *supra* note 150, ¶10.

¹⁵³ G.A. Res. 71/1, *supra* note 150, ¶69.

¹⁵⁴ G.A. Res. 71/1, *supra* note 150, ¶70.

¹⁵⁵ McAdam, *supra* note 151 at 7.